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No. 95 - 1805

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1995

RICHARD BUSCH, as Administrator of the Estate of MELISSA BUSCH, Deceased,

Petitioner,

vs.

AMREP, INC.

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

REPLY BRIEF OF RICHARD BUSCH

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A. The Illinois Supreme Court failed to understand both the concept of federal preemption and the requirements of the Federal Hazardous Substances Act.

Respondent's defense of the opinion of the Supreme Court of Illinois is a good illustration of the confusion that exists in the law concerning the federal preemption of state tort remedies. Nowhere in Respondent's brief does it address the concept of

the "requirements" of the Federal Hazardous Substances Act that supposedly conflict with Illinois product liability law thus working a preemption of the latter. For reasons that are not readily apparent, Respondent seeks to vilify the Petitioner rather than making its own exposition of what the requirements of the FHSA are. It is only from this starting point that conflicts can be identified between state and federal law that could result in preemption of state law.

Despite Respondent's loud protests and accusations against the Petitioner, there can only be either the general labeling requirement under 1261(p)(1) or a specific requirement established by a lawfully adopted regulation under 1262(b). Regarding warnings for the use of the product Section 1261(p)(1) is plain and unambiguous in requiring that the label contain:

> (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the commission pursuant to section 1262 of this title.

There is absolutely no authority in the statute that permits the Consumer Product Safety Commission to offer opinions as to what may be adequate "precautionary measures describing the action to be followed or avoided." The only way specific language for the use of a product may be mandated is by regulation under Section 1262.

Plaintiff certainly does claim that the existing instructions for Misty were not adequate and that this was the cause of Melissa Busch's death. Adequate instructions for use are clearly mandated by the FHSA; and absent the lawful adoption of a regulation providing for a specific label, what might be "adequate instructions for its use" will be open to interpretation. This is true whether the issue is before a state court hearing a product liability case or a United States District Court hearing an enforcement action against a manufacturer brought by the CPSC.

The clear mistake of the Illinois Supreme Court was to accord the actions of the Consumer Product Safety Commission the force of law. The Court correctly notes that the Plaintiff attempted to impose upon Amrep a warning that would provide "adequate instructions for use," but failed to appreciate that this was identical to the requirements of Section 1261(p)(1) of the FHSA.

After this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), finding federal preemption of state tort remedies has become the easy and expeditious way to dispose of product liability cases without thought or analysis. Both *Moss v. Parks Corporation*, 985 F.2d 736 (4th Cir: 1993), and *Comeaux v. National Tea Co.*, 81 F.3d 42 (5th Cir: 1996), involved flammable products which caught fire causing the plaintiffs' injuries. Both products, paint thinner in *Moss* and lighter fluid in *Comeaux*, were labeled as combustible; and both courts could have as easily reached the result they

did by holding as a matter of law that the labeling was adequate under common law principles. In fact, this is what the trial court in *Comeaux* had done; and it was only when the case reached the Fifth Circuit that preemption was used to give judgment to the defendant.

B. The Facts in *Jenkins v. James B. Day & Co.* are identical to this case.

Respondent argues that *Jenkins v. James B. Day & Co.*, 69 Ohio St.3d 541, 634 N.E.2d 998 (1994), is distinguishable on its facts from the case at bar. This is a curious argument considering that both cases involved the deaths of users of products containing methylene chloride where the cause of death was identified as acute methylene chloride intoxication. Further, both cases involved common law product liability actions in which the defense urged that the actions were preempted by the FHSA. As in the case at bar, the defendant in *Jenkins* urged that the plaintiff was attempting to impose duties to warn on it that were broader and in addition to those required by Section 1261(p)(1) of the FHSA and were thus preempted. The court rejected this outright and held:

> Section 1261(p), Title 15, U.S.Code does not specify all the language required on a product's warning label. See *Chem. Specialties Mfrs. Assn. v. Allenby*, (C.A.9, 1992), 958 F.2d 941, 950. A manufacturer of a product formulates its own warning

> language, guided by the FHSA, but the language is not reviewed for adequacy by a federal agency. [FN3] In particular, Section 1261(p)(1)(E), Title 15, U.S.Code requires a label on a hazardous substance to contain "an affirmative statement of the principal hazard or hazards" and Section 1261(p)(1)(F) requires a label to state "precautionary measures describing the action to be followed or avoided." Given that a manufacturer selects its own language to convey this information, to comply with the FHSA a manufacturer must supply a label which provides a reasonably adequate warning to inform a user of the risks involved, and the action to take to avoid those risks. Because this is essentially the same requirement appellee attempts to impose on appellant pursuant to R.C. 2307.76(A)(1), it is "identical to the labeling requirement under section 2(p) [Section 1261(p), Title 15, U.S.Code]" for purposes of the FHSA's preemption clause, Section 1261 note (Effect upon Federal and State law), Title 15, U.S.Code and appellee's claim is not preempted. [FN4] We thus agree with the court of appeals that the trial court erred in granting summary judgment in favor of the appellant on the basis of preemption. (At 634 N.E.2d 1004)

Respondent would make much of the fact that the action of the Consumer Product Safety

Commission regarding methylene chloride was not discussed by the court in *Jenkins*. Respondent argues that if only this had been done the Ohio Supreme Court would have decided the case in the defendant's favor in the same manner as the Illinois Supreme Court. This necessarily supposes that the actions of the Consumer Product Safety Commission were not raised in *Jenkins* and brought to the court's attention. The two potential explanations for this are that defense counsel incompetently failed to discover what the Consumer Product Safety Commission had done or, assuming that counsel was aware of this, had concluded that since no regulation had been adopted mandating a warning for methylene chloride the actions of the CPSC did not have the force of law. It is respectfully suggested that the latter explanation is more reasonable.

C. *Freightliner Corp. v. Myrick* & *CSX Transportation, Inc. v. Easterwood* require that there be positive federal law for preemption to occur.

In attempting to negate the impact of *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995) and *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), Respondent concedes Petitioner's argument regarding the necessity of positive federal law as a prerequisite to preemption. There is absolutely no difference between the necessity of a "requirement" under the Federal Hazardous Substances Act and the necessity for a safety standard that is in effect under the National Traffic

and Motor Vehicle Safety Act of 1966. Respondent concedes that the voluntary labeling standard adopted by the CPSC does not have the force of law, but argues that the general provisions of Section 1261(p) are sufficient in themselves to extinguish Plaintiff's action. Again, this section only provides that an adequate warning for use of the product be given without specifying what that warning is. Respondent's obligations under both Illinois product liability law and the FHSA are identical. There can be no preemption because it was certainly possible for Respondent to comply both with Illinois common law and Section 1261(p)(1) of the FHSA.

To the same extent the "rule, regulation, order, or standard" considered by the Court in *CSX Transportation, Inc.* under the Federal Railroad Safety Act is identical to the "requirement" under the FHSA in order for there to be preemption. Both statutes require that before preemption can occur there must be a positive expression of federal law which conflicts with state law on the same subject. In the case at bar the Illinois Supreme Court held that Illinois product liability law would conflict with the FHSA simply because the FHSA required an adequate warning for the use of the product without specifying what that warning would be.

D. The Supreme Court of the State of Illinois decided this case exclusively on the federal issue of whether the FHSA preempted the Plaintiff's state tort remedy.

The only question, federal or otherwise, presented by this case is whether the FHSA preempts the Petitioner's state product liability action. This was the basis alleged by Respondent below and upon which the trial court granted the Defendant's summary judgment. This appeal is brought from the judgment of the Supreme Court of the State of Illinois, and nowhere in that Court's opinion is the issue of waiver considered or even the word waiver used. The Respondent is not seriously arguing that there was an adequate and independent state ground that the Illinois Supreme Court relied upon in granting it summary judgment. Rather, Respondent's complaint is that the Supreme Court of the State of Illinois did not accept its arguments that the Plaintiff had waived certain positions at various stages of the case. In any event, the mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that would relieve this Court of the necessity of considering the federal question. *United Airlines v. Mahin*, 410 U.S. 623, 630-31 (1973).

CONCLUSION

The opinion of the Illinois Supreme Court in dealing with the very important doctrine of federal preemption is plainly wrong. This opinion is an open invitation for courts, both state and federal, to further erode the traditional police powers of the states and substantially affect the delicate balance that is

essential in our federal system between state and federal jurisdiction.

It is again respectfully requested that the Court grant the Petition for Writ of Certiorari or, in the alternative, remand this case to the Supreme Court of the State of Illinois for further consideration in light of this Court's opinion to be issued in the case of *Medtronic, Inc. v. Lohr*, Nos. 95-754, 95-886.

Respectfully submitted,

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